



# THE INTERIM

October 2010

A monthly newsletter of the Montana Legislative Branch

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The *Interim*, along with up-to-date information about interim committees, is also available on the Legislative Branch Website at [leg.mt.gov](http://leg.mt.gov).

**New Online:** Legislators can now fill out and print bill draft requests at their own convenience using an online form available at [leg.mt.gov](http://leg.mt.gov) under "For Legislators." Completed requests should be submitted to the Legislative Services Division.

## Legislative Interim Committees Wind up Work, Submit Requests for 2011 Bill Drafts

Interim committees of the Montana Legislature have wrapped up the policy studies they undertook in the months between the 2009 and 2011 sessions. With a few exceptions, the committees are required by legislative rule to finish by Sept. 15 to allow staff time to complete final reports and begin drafting bills for the next session.

Administrative committees (Legislative Council, Audit Committee, and Finance Committee) may continue to meet in the remaining months before the 62nd regular session starts on Jan. 3. The Revenue and Transportation Interim Committee will meet in November to prepare an initial revenue forecast for legislative appropriation.

In this issue, you'll find reports on some of the committees' final products. Other committee updates will appear in the November issue of *The Interim*.

Complete copies of the committees' final reports will also be available under "What's New" on the legislative website, [leg.mt.gov](http://leg.mt.gov), as they become available.

## Economic Affairs Committee Approves Proposals to Modify Workers' Compensation System

At its final meetings Aug. 19 and Sept. 3, the Economic Affairs Interim Committee approved five committee bills: three relating to the SJR 30 study of workers' compensation, one defining an order for certain Department of Livestock activities, and another revising the operations of assistance programs for certain licensed medical providers.

The committee reviewed five committee bill drafts Aug. 19. Because it requested changes to four of the bills, the committee held a teleconference meeting Sept. 3. At that time, various medical providers described their concerns about a workers' compensation bill endorsed as a committee bill at the August meeting. That bill contained recommendations developed over three years by a Labor-

### 3 Legislative Services Division Staff Named to NCSL Offices, Committees



*Susan Fox*

Susan Byorth Fox, executive director of the Legislative Services Division, has been appointed to a one-year term as a staff vice chair of the Legislative Effectiveness Committee of the National Conference of State Legislatures.

The committee examines strategies and procedures for making legislators and their staff more effective by focusing on key skills for legislators and on key operations and powers of state legislatures.



*Pat Murdo*

Pat Murdo, legislative research analyst, has been named to the NCSL Standing Committee on Communications, Financial Services and Interstate Commerce. The committee serves as a forum for legislators and staff to exchange information on state policy approaches to electronic commerce, banking, insurance, securities and other financial services issues, interstate commerce and taxation of electronic transactions, telecommunications, and interstate business activity taxes. It also works to identify emerging issues of importance to state legislatures.



*Gayle Shirley*

Gayle Shirley, legislative information officer, has been appointed to a one-year term as secretary of the executive committee of the NCSL Legislative Information and Communication Specialists (LINCS).

Her job duties will include maintaining minutes of LINCS meetings and producing the LINCS newsletter.

Management Advisory Council (LMAC) appointed by the state Department of Labor and Industry. After these comments, the committee agreed to allow the sponsor of the LMAC bill, Rep. Chuck Hunter, to continue working with medical providers, LMAC members, and the Department of Labor and Industry to see if a resolution of the physicians' and hospitals' complaints could be reached to the LMAC members' satisfaction. Rep. Hunter will retain the final say on the language of the bill he ultimately introduces.

The committee recommended changing the workers' compensation system in keeping with recommendations from the Labor-Management Advisory Council (LC 255). Among these changes are:

- efforts to improve stay-at-work or return-to-work options for injured workers;
- a revised definition of when an injury is within the course and scope of employment;
- a revised method to determine or terminate various benefits; and
- a requirement for insurers to pay attorney fees for settlements of previously denied medical benefits.

The committee also recommended legislation that would:

- require additional executive-level insurance expertise on the Montana State Fund board of directors (LC 310).
- allow the state as an employer to choose whether to self-insure, use a private insurer, or remain with the Montana State Fund for workers' compensation coverage (LC 311).

The cost impacts of changes to the workers' compensation system are described in various reports presented at the September, August, and May committee meetings. The reports are available at the committee website: [leg.mt.gov/eaic](http://leg.mt.gov/eaic).

#### Other Committee Recommendations

The committee also recommended changing the definition of an "order" issued by the Department of Livestock and prohibiting an order from being used to implement a program (LC 309). This recommendation was in response to discussions before the committee by ranchers in a

designated surveillance area for brucellosis and their frustration with an associated Department of Livestock monitoring program.

The committee also recommended revising how medical assistance programs should work for medical providers who are troubled by addictions or medication use while on the job (LC 312). The recommendation, developed as the result of a subcommittee discussion with members from the Boards of Medical Examiners, Pharmacists, Dentists, and Nursing, would require action by the relevant licensing board if a licensee in the medical assistance program had three violations during the program contract period.

At its August meeting, the committee adopted the draft report for the SJR 14 study of state laboratory facilities and agreed to send a letter to the accreditation agency for state veterinary laboratories to urge continued accreditation for Montana's laboratory. The committee also heard from the Montana Historic Preservation and Development Commission, from the Department of Commerce on the wood products revolving loan fund, and from John Fitzpatrick, a NorthWestern Energy lobbyist, on projected energy developments as they relate to Montana's economic recovery.

At the September meeting, Dore Schwinden, the new director of the Department of Commerce, reported on the award of the Custer Country tourism contract to the Billings Chamber of Commerce. He also responded to questions related to recent employment issues at the department.

### State Agency Proposals

In August, the committee authorized the drafting of legislative proposals for state agencies that it is responsible for monitoring.

The State Auditor's Office requested the drafting of bills to:

- provide the insurance commissioner with authority to review and approve health insurance premiums (LC 269);
- create a state-level health insurance exchange (LC 270);
- revise state health insurance laws in line with minimum reforms under the federal health insurance laws (LC 271);

- create a state-level external review process for health insurance (LC 272);
- adopt model language for the Montana Guaranty Association (LC 273);
- revise credit scoring exceptions for extraordinary events (LC 274);
- create a securities restitution fund (LC 275);
- adopt a model act for health insurers' risk-based capital (LC 276); and
- adopt a bill to clean up language in insurance and securities laws (LC 277).

The Department of Commerce requested a bill draft for a renewable-energy initiative in schools (LC 301).

The Department of Agriculture requested bill drafts to:

- allow commodity dealers to use deficiency bonds (LC 266); and
- provide for court orders, fines, and liens for noncompliance with noxious weed laws (LC 267).

The Department of Labor and Industry requested bill drafts to:

- revise professional and occupational licensing (LC 256);
- clarify wage payment provisions (LC 257);
- revise the Montana Human Rights Act (LC 260);
- revise the Workforce Investment Act (LC 261);
- adjust how process is served for the Board of Personnel Appeals (LC 262);
- revise unemployment insurance laws (LC 263);
- prohibit the late introduction by employers of certain unemployment information (LC 264); and
- add a total unemployment trigger for extended unemployment benefits (LC 265).

A wrap-up of the committee's 2009-2010 work will be available in a committee final report. A separate report will discuss the committee's work on the SJR 30 study of workers' compensation. That report also will include discussion of a subcommittee that worked on issues related to employers being able to obtain return-to-work information from medical providers treating injured

workers. These reports will be posted to the legislative website when completed.

For more information, contact Pat Murdo, committee staff, at 406-444-3594 or [pmurdo@mt.gov](mailto:pmurdo@mt.gov). Or visit the committee website at [leg.mt.gov/eaic](http://leg.mt.gov/eaic).

## Energy & Telecommunications Committee to Move Forward with Three Bill Drafts

The Energy and Telecommunications Interim Committee met Sept. 10 to wrap up its interim assignments. The committee is bringing three bill drafts before the 2011 Legislature for consideration, but it will not recommend any revisions to Montana's energy policy.

The first bill draft approved by the committee, LC 318, would change the process for reviewing the state energy policy. Senate Bill 290, enacted in 2009, directed the ETIC to review and potentially revise the state's current energy policy every interim. LC 318 would allow the ETIC to update the energy policy on an as-needed basis, much the same way the committee reviews the universal system benefits program each interim.

The second proposal (LC 319) would revise the definition of an eligible renewable resource to include expansions to hydroelectric facilities. That would allow hydroelectric expansions to be included in Montana's Renewable Portfolio Standard. The draft also would grant the state Public Service Commission rulemaking authority to clarify that the calculation of energy generation and renewable energy credits reflects the actual electrical production from the expansion as it relates to seasonal water conditions.

The last proposal (LC 320) would extend the sunset date in existing 9-1-1 statutes for the enhanced wireless account from June 30, 2011, to June 30, 2015. Current statute requires 16 percent of the 9-1-1 wireless enhanced account to be distributed to wireless providers serving cities and counties with less than 1 percent of the total population of the state.

In addition to examining potential legislation, the ETIC also continued to work on its energy policy assignment. In late July, the committee reached a consensus on energy policy statements related to energy conservation and efficiency, alternative energy resources, transmission

line development, and wind integration. However, the committee was unable to reach a consensus on statements related to the role of fossil fuels, including coal, oil, and natural gas, in Montana's energy portfolio. Because the committee could not reach a consensus on the full package of energy policy issues, it did not reach a consensus on a bill draft incorporating a revised energy policy.

During the committee's September meeting, members reconsidered the revisions to the state energy policy but again did not reach a consensus. A proposed energy policy bill draft failed on a 4-4 vote. In accordance with SB 290, the committee is required to report to the Legislature, and the committee approved an energy policy report.

However, members did not agree to any findings or recommendations. The committee's recommendation to the 2011 Legislature will be that they were unable to reach a consensus. The energy policy report, which is an outline of the work the committee did over the past year to fulfill the mandates of SB 290, will be published and available to the 2011 Legislature.

For more information on the ETIC, contact committee staff Sonja Nowakowski at [snowakowski@mt.gov](mailto:snowakowski@mt.gov) or 406-444-3078 or Todd Everts at [teverts@mt.gov](mailto:teverts@mt.gov) or 406-444-3747. More information is also available on the committee's website at [leg.mt.gov/etic](http://leg.mt.gov/etic).

## Law & Justice Committee Advances 15 Recommendations to Legislature

Of the 17 bills considered by the Law and Justice Interim Committee at its final meeting Sept. 9-10, in Helena, 15 will advance to the 2011 Legislature. Fourteen of the committee bills are aimed at changing the culture of impaired driving in Montana, and the other bill would lengthen the period of time that biological evidence must be preserved in certain felony criminal cases.

The LC numbers for each committee bill may be found by following the "Legislation" link under "Publications" on the committee's website at [leg.mt.gov/ljic](http://leg.mt.gov/ljic).

### SJR 39 Study of DUI Laws

Directed by a 2009 legislative study resolution (SJR 39) to examine Montana's DUI laws, the committee spent the



past 14 months dealing with policy questions ranging from how to prevent underage drinking to how to get repeat DUI offenders into treatment and off the streets. National Highway Traffic Safety Administration statistics show that Montana's alcohol-impaired driving fatality rate in 2008 ranked highest in the country per 100,000 vehicle miles traveled.

According to data from the Motor Vehicle Division of the state Department of Justice, 6,954 adults and minors were convicted of impaired driving in 2009. Of these, 1,435 were for second or third offenses and 217 were for felony offenses. A fourth or subsequent offense is a felony. The average blood alcohol concentration (BAC) of adults convicted of impaired driving of noncommercial vehicles in Montana for 2008 through 2009 was .16 for first-time offenders, which is more than twice the legal limit of .08. The average BAC for fourth and subsequent offenders was .20.

According to national data, hard-core drunk drivers (drivers with a BAC of .15 or above) account for 68 percent of drunk-driving fatalities nationally and are nine times more likely to be repeat offenders.

Drunk driving starts at an early age. A University of Montana study of felony DUI offenders in the Department of Corrections' 13-month residential treatment program, WATCH, found that 50 percent of the offenders had been convicted of their first DUIs while under 21 years of age. About 33 percent of Montana highschool students reported in 2007 that they binge drank (consumed 5 or more drinks on one occasion) within the past 30 days. This was the highest rate of underage binge drinking in the nation. According to another national survey, 64 percent of Montana youth said they obtained their alcohol free. Of those, nearly 30 percent said it was given to them by an unrelated person age 21 or older.

According to national studies, the strategies most effective in combating the culture of impaired driving include prevention of underage drinking and treatment that is combined with intensive supervision with swift and certain penalties. The 14 committee bills resulting from the SJR 39 study provide an opportunity for the 2011 Legislature to consider how best to implement these strategies.

## **SJR 29 Study of Biological Evidence**

Another study resolution assigned to the committee, SJR 29, dealt with concerns that Montana needs better statewide standards for preserving biological evidence for future DNA analysis in felony criminal cases. The Montana Innocence Project, Montana Coalition Against Domestic and Sexual Violence, and state Attorney General's Office supported the study, citing the need to preserve evidence that could exonerate wrongly convicted people or help identify perpetrator in unsolved cases for a longer period than is provided for in current law.

Current state law requires law enforcement agencies to keep biological evidence for at least 3 years after a conviction becomes final, unless a longer period is approved by the court. However, the law is silent on how long the evidence should be kept in unsolved cases. A statewide survey of city and county law enforcement agencies showed a lack of uniform procedures and indicated that many agencies keep evidence involving serious crimes longer than 3 years.

However, the committee's study also showed that local evidence storage rooms are at or near capacity, and it raised concerns that a statewide requirement to keep biological evidence longer would strain local fiscal resources, especially in smaller jurisdictions. Some stakeholders also argued that current law is sufficient.

The committee will recommend that the 2011 Legislature adopt LC 354, a bill to require that biological evidence collected in certain specified felony criminal cases be preserved for the period of time in the statute of limitations for the crime, or for 30 years, whichever is less. The specified crimes are: deliberate homicide, mitigated deliberate homicide, negligent homicide, vehicular homicide while under the influence of drugs or alcohol, sexual assault, and sexual intercourse without consent.

For more information about committee activities, visit [leg.mt.gov/ljic](http://leg.mt.gov/ljic). A final report, which will summarize committee activities and study findings and recommendations, will be published and posted to the website prior to the legislative session.

For more information, contact Sheri Heffelfinger, committee staff, at [sheffelfinger@mt.gov](mailto:sheffelfinger@mt.gov) or 406-444-3596.

## Finance Committee to Meet Oct. 7-8

The Legislative Finance Committee will meet Thursday and Friday, Oct. 7-8, in Room 102 of the State Capitol. The LFC performance measurement groups will meet at 2 p.m. Thursday and the full committee will meet at 8:30 a.m. Friday. The materials for the group meetings and the agenda and reports for the full committee meeting are available on the Legislative Fiscal Division website at [leg.mt.gov/lfc](http://leg.mt.gov/lfc). Or contact Amy Carlson, director of the Legislative Fiscal Division, at [acarlson@mt.gov](mailto:acarlson@mt.gov) or 406-444-2986.

The draft agenda for the full committee meeting includes the following items:

- an update on pension plans, including the latest actuarial valuations;
- an update on the “Reference Book” (options for closing the budget gap);
- a report on the “risk assessment” for the FY 2012-13 budget, including revenues and expenditures;
- a report on the revenue recommendations process;
- an information technology update;
- updates on trust land issues and the current wildland fire season;
- a report on additional American Recovery and Reinvestment Act (ARRA) allocations for education and Medicaid FMAP (federal match rate); and
- reports by performance measurement work groups on recommended 2013 biennium goals.

## LFC Subcommittees Discuss Options to Close Predicted Budget Gap

During late August and early September, LFC subcommittees assigned to review, discuss, and take agency and public input on options listed in a “reference book” for dealing with the projected budget gap between revenues and expenditures, continued their work. All three subcommittees met during this time:

- Judicial Branch, Law Enforcement, and Justice Subcommittee – Sept. 8
- Department of Public Health and Human Services Subcommittee – Sept. 15

- Education and Local Government Subcommittee – Aug. 17-18 and Sept. 17

In addition, committee members, with the assistance of LFD staff, have discussed the options with other interim committees, including most recently the State Administration and Veterans’ Affairs Interim Committee. These discussions are aimed at determining which options might be viable and so need additional research by LFD staff. For more information, contact LFD staff at 406-444-2986.

## Revenue Committee Approves Use of Second Economic Forecasting Service

The Revenue and Transportation Interim Committee met Sept. 15-16. Jim Diffley, of Global Insight, and Steve Cochrane, of Moody’s Economy.com, presented the national and state economic outlook for Montana and the nation.

These two firms provide a variety of states with economic forecasts that the states use in developing state revenue estimates. Montana has a contract with Global Insight. Their forecasts are used by the Legislative Fiscal Division and the governor’s budget office to estimate state revenue. Following the presentations, the committee voted to obtain a subscription to the services of Moody’s Economy.com for a one-year period to help the committee and the Legislature in the revenue estimating process.

The committee also recommended two legislative proposals dealing with the disclosure of certain information on the realty transfer certificate for class four residential property and commercial property. One proposal (LC 430) would allow the public disclosure of the property address, legal description, and actual sales price listed on the realty transfer certificate for residential property. The other proposal (LC 431) would allow the public disclosure of the same information for commercial property.

## Economic Impact Statements

Dan Bucks, director of the Department of Revenue, informed the committee that the department will prepare economic impact statements to deal with concerns raised about two proposed rules. The first rule, MAR Notice

No. 42-2-845, deals with the apportionment of income of telecommunications services entities for corporate license tax purposes. The second proposed rule, MAR Notice No. 42-2-846, deals with appraisal methods and standards for centrally assessed property.

State law (section 2-4-405(2)(a) through (2)(h), MCA), provides the elements that are included in an economic impact statement for proposed rules. The department will present the economic impact statements to the committee in November and reschedule the public hearings on the proposed rules to accommodate the preparation of the statements.

Additional coverage of the September committee meeting will appear in the next issue of *The Interim*.

### Next Meeting in November

The committee will meet Nov. 19 in Helena. The primary purpose of the meeting is to adopt initial revenue estimates available for legislative appropriation next session. The committee's revenue estimates are contained in HJR 2.

For more information about the committee, contact Jeff Martin, committee staff, at 406-444-3595 or [jmartin@mt.gov](mailto:jmartin@mt.gov). Or visit the committee website at [leg.mt.gov/rtic](http://leg.mt.gov/rtic).

## Legislative Panel Recommends Changes to Teachers' Retirement System

In August and September, the State Administration and Veterans' Affairs Interim Committee wrapped up its interim work, including the study and redesign of the state's public employee retirement systems.

In August, the committee reviewed initial information about the normal cost of the various redesign options it was exploring for the Teachers' Retirement System (TRS) and the Public Employees' Retirement System (PERS). The committee then voted to recommend two alternative plan designs for the TRS to the 2011 Legislature for its consideration. They made no recommendation for a redesign of the PERS. The recommendation completes the HB 659 study.

One alternative for TRS would establish two money purchase plans for new TRS members. A new hire would choose between the plans and would receive retirement benefits based on the member's account balance (contributions and interest) and an employer match of that balance. The level of the match would depend on the number of years of service the member had in the system.

The second alternative would establish a TRS professional retirement option for new hires. A new hire who worked 30 or more years would receive a 2 percent multiplier for all years of service, while current members and new hires who worked less than 30 years would receive the current 1.667 percent multiplier. In addition, the alternative would raise the current retirement age, change the vesting time period for new hires, and extend the time period used to calculate the highest average compensation, which is one part of the retirement benefit formula.

The two options are summarized below.

### Option 1: Choice between money purchase plans

- Establish two plans between which new hires can select membership.
- Both would be money purchase plans (also referred to as individual account defined-benefit plans or cash balance plans). The benefit would be an annuity at retirement age based on the accrued balance of the member's account.
- A member's account would be credited with his or her employee contributions (currently set at 7.15 percent of salary) and interest credits.
- At retirement, the vested member's accumulated account balance would be matched up to 100 percent by the employer, and the total would be annuitized for a retirement benefit.
- The TRS Board would grant a minimum interest rate of 5 percent and a maximum of 9 percent. The goal would be to average 7 percent over the member's career.
- The member would be 25 percent vested after 5 years, increasing 5 percent each year for years 5 through 10, and increasing 10 percent each year for years 10 through 15 until the member is fully vested at 15 years.
- Retirement eligibility age would be 60 and vested.

- The second money purchase plan would have the same provisions as the first, except that a member would pay an additional one-half percent of salary into his or her account. If the member remained active in the system for 30 years, the employer would match the additional employee contribution at retirement, along with interest on the additional contribution.

## Option 2: Professional Retirement Option (PRO)

- Keep the general structure of the existing TRS.
- Increase new employees' contribution rate by 0.54 percent.
- Increase the number of years used to calculate a member's average final compensation from 3 to 5 years.
- Revise the time to vest in the employer contributions to the benefit from a 5-year cliff vesting to a 15-year graded system. (The member would be 25 percent vested after 5 years, increasing 5 percent each year for years 5 through 10, and increasing 10 percent each year for years 10 through 15 until the member is fully vested at 15 years.)
- The benefit multiplier would be 1.667 percent for retirement before 30 years of service.
- A 2 percent multiplier would apply for all years of service if the member retired with 30 or more years of service.
- Service retirement at any age with 30 or more years of service (currently it is 25 years of service) or at age 60 and vested.
- Early retirement age would be 55 and vested, with a full actuarial reduction taken for early retirement.

## Veterans Honor Tropila



*Sen. Joe Tropila*

At the September meeting, the Board of Veterans' Affairs recognized and celebrated Sen. Joe Tropila for his work with the board and for veterans' issues throughout the years. At several points during the meeting, committee members also spoke of Tropila's accomplishments and generosity to them during his time of service.

The September meeting marked the final interim meeting for the termed-out senator from Great Falls.

## Mail Ballots, Bonus Pay

Also in September, the committee considered a wide range of topics, including taking public comment on a draft bill dealing with mail ballots and discussing campaign contribution disclosure and retirement plan recommendations.

After taking public testimony about mail ballots, a motion to forward a committee bill on mail ballots to the 2011 Legislature failed on a tie vote. Instead, the committee requested that the secretary of state allow Rep. Pat Ingraham to attend meetings of a work group the secretary convened to resolve many of the issues among stakeholders in the mail ballot debate.

Dennis Unsworth, outgoing commissioner of political practices, summarized the challenges facing his office after recent budget cuts and a surge in ethics and disclosure complaints filed with the office. He discussed his office's successes with and ambitions for an online system for filing and searching campaign finance disclosure reports.

The committee also completed the HJR 35 study of state employee bonus pay. After reviewing a draft final report, the committee recommended that:

- the primary statutes governing bonus pay, both those statutes that allow for bonus pay as part of the broadband pay plan and those that preclude illegal bonus pay, be retained intact; and
- the Department of Administration exercise its authority to ensure that agencies comply with section 2-18-301, MCA, and Montana Operations Manual Policy 3-05-1.

The statute and policy referred to in the recommendations require all agencies to adopt and file pay plan rules with the Department of Administration. At times, the HJR 35 study was hampered by the lack of information about bonus payments and pay plan rules.

## Retirement Proposals

Section 5-5-228, MCA, requires the committee to recommend to the next Legislature whether legislative



proposals to change any of the state's public employee retirement systems should be enacted. Various system stakeholders and the two retirement boards proposed changes earlier in the interim and the committee considered the recommendations in September. With the exception of two housekeeping bills and a general rewrite of the Volunteer Firefighters' Compensation Act, the committee recommended that most of other proposals should not be passed by the Legislature. The committee recommended that four proposals by the retirement boards that included benefit and funding changes should have the funding elements split into separate bills for the Legislature to consider.

More information about the State Administration and Veterans' Affairs Interim Committee and the results of its interim work can be found at [www.leg.mt.gov/sava](http://www.leg.mt.gov/sava). Or contact Rachel Weiss, committee staff, at [rweiss@mt.gov](mailto:rweiss@mt.gov) or 406-444-5367.

## Water Policy Interim Committee to Refer 5 Draft Legislative Proposals

During the 2009-2010 interim, the Water Policy Interim Committee studied adjudication of water rights, exempt wells, coal-bed methane water, septic systems, and water right regulation. Five draft legislative proposals as well as findings and recommendations are included in "Boiling it Down," the committee's draft report.

The proposals approved by the committee would:

- allow those who use the beds of navigable rivers for such things as irrigation diversion dams to apply for an historic easement, lease, or license to compensate the state for that use since the state owns the beds of navigable rivers. It also would create a process to obtain easements, leases, or licenses for new uses on the beds of navigable rivers. This bill also was requested by the Environmental Quality Council. (LC 348)
- require new subdivisions to contain the mixing zone for the septic system drain field within the subdivision or obtain an easement to locate the mixing zone outside the boundaries of the subdivision. (LC 350)
- clarify that counties may require public water and sewer systems in new subdivisions. (LC 349)
- allow a water right holder to change a water right to aquifer recharge or mitigation or marketing for those purposes without a specific new project that needs offset water. Current law does not allow the marketing of water without first identifying each user, each place of use, and each contract. Nor does current law explicitly allow a change to aquifer recharge or mitigation without a corresponding new appropriation application. (LC 351)
- allow district court judge discretion in awarding attorney fees and court costs in water-related cases appealed to district court. (LC 347)

The committee also made the following recommendations:

- The Ground Water Investigation Program should continue to be funded at a level that will continue to provide information about the state's ground water resources that will be used by policymakers and others.
- Continue funding of water right adjudication.
- In future interims, the WPIC should study the scope and limitations of adjudication and how the adjudication result relates to the enforceable accuracy of water right claims. The study should examine the role and power of the DNRC to evaluate changes in water rights. The study should analyze how adjudication and change authorizations work together and suggest improvements to those systems.
- In future interims, the WPIC should evaluate the current water plan, determine what parts are still relevant and what sections need updating, and, if possible, suggest ways that the water plan can be updated to meet the future water needs of Montana.
- Applicants and the DNRC should work together to identify specific issues that may unnecessarily impede the permit and change process and report those findings, along with suggestions to improve the process, to the next WPIC.

Additional information about the Water Policy Interim Committee is available at [leg.mt.gov/water](http://leg.mt.gov/water). Or contact Joe Kolman, committee staff, at 406-444-9280 or [jkolman@mt.gov](mailto:jkolman@mt.gov).

## The Back Page

## Redistricting Before and After 'One Person, One Vote'

by Rachel Weiss

Legislative Research Analyst

During debate at the Montana Constitutional Convention of 1971-1972, Delegate Carman Skari of Liberty County uttered a fitting summary of the challenges inherent in the redistricting process: "There is a great difficulty in being objective here, because one man's gerrymander can be [an] other one's logical district."<sup>1</sup>

Each political district drawn – no matter how it is drawn, or by whom, or for what reasons – will create advantages for certain people and disadvantages for others. Drawing lines that satisfy everyone is impossible. Moreover, when the lines are drawn by the very people that they will affect – generally legislators – the process itself can be opened up to charges of self-serving map-drawing, backroom deals, and the appearance of impropriety. For this reason, many states have designed redistricting processes that provide sideboards for what can and cannot be done in a redistricting plan, open the process to the public as much as possible, or even remove the task from the legislative body entirely.

In Montana, delegates to the Constitutional Convention, after living through the state's difficulties with redistricting over the years, chose to remove the task from the Legislature by creating a commission to redraw congressional and state legislative district lines.

This article will look at the history leading up to this decision, explore the constitutional standard of "one person, one vote," and highlight how Montana and other states structure their redistricting processes in pursuit of a better way to meet that standard.

**Redistricting and Reapportionment**

The terms "redistricting" and "reapportionment" are often used interchangeably in discussions of this topic. However, they have distinct meanings. Redistricting is the act of

drawing new political district boundaries,<sup>2</sup> while reapportionment is the distribution of seats in a legislative body among a set number of districts so that the boundaries of the district do not change but the number of members per district do.<sup>3</sup>

A useful illustration of the difference between redistricting and reapportionment is how states are allocated representation in the U.S. House of Representatives. After every decennial census and to account for population changes in the preceding 10 years, seats in the U.S. House are reapportioned to the 50 states using a formula set by Congress.<sup>4</sup> Once each state is notified of the number of seats it will receive, the state then must redistrict, thus creating new or updating current boundaries to reflect any changes in population that might have occurred in the state since the last census.<sup>5</sup>

**One Person, One Vote: a Bit of History**

Population obviously has a lot to do with reapportionment and redistricting. But the principle of "one person, one vote" that is taken for granted today is a relatively recent establishment in the redistricting lexicon. Despite the fact that the U.S. Constitution originally apportioned representatives (and direct taxes) among the states by population, it also contained the "Three-Fifths

2 "Redistricting Law 2010," National Conference of State Legislatures; Nov. 2009, p. 227.

3 Ibid.

4 After each state receives one seat, the remaining seats are allocated using a formula set by Congress, which since 1941 is the Method of Equal Proportions. For information about the formula visit <http://www.census.gov/population/www/censusdata/apportionment/computing.html>. The State of Montana and several elected officials challenged in court the use of this method after the 1990 Census. Although initially victorious in federal District Court, Montana eventually lost the lawsuit when the U.S. Supreme Court ruled that Congress was within its constitutionally prescribed limits when it set the Method of Equal Proportions as the formula for apportioning representatives among the states. See *United States Department of Commerce v. Montana* (91-860), 503 U.S. 442 (1992).

5 Montana currently has only one seat in the U.S. House of Representatives. It lost a second seat after the 1990 Census and has little hope of regaining that seat in 2010, despite continued population growth. For more information, see Anthony Salvanto and Mark Gersh, "Which States Will Gain Power After Census?"; CBS News; March 25, 2010; available from: <http://www.cbsnews.com/stories/2010/03/24/politics/main6329858.shtml>; accessed June 10, 2010.

1 Verbatim Transcript; Montana Constitutional Convention; Vol. IV, p. 682.

Compromise.” That provision excluded from population counts “Indians not taxed” and counted “all other persons” (slaves) as three-fifths of a free person when calculating populations.<sup>6</sup> The compromise increased the representation accorded to states that allowed slavery, but less than if each slave had been counted as a “whole person.” Not quite “one person, one vote.”

Even after the Thirteenth Amendment to the U.S. Constitution abolished slavery and the Fourteenth Amendment abolished the three-fifths calculation, states did not always distribute political representatives with population equality in mind. Many states assigned a representative to each political subunit (generally counties) and then used population counts to divvy up the remaining representatives.<sup>7</sup>

In Montana, the Constitution of 1889 established a “little federal system” that assigned each county one senator and apportioned membership to the House of Representatives based on population. A few years later, legislation was enacted that gave each county one representative regardless of population and apportioned the rest using a ratio related to the county’s population.<sup>8</sup> Although the ratio changed throughout the years, by the 1950s and 1960s the state was badly malapportioned. Rural counties were granted far more representation by the Montana Constitution and statutes than population would otherwise dictate.<sup>9</sup> Many other states faced similar situations.

The judicial branch had long stayed out of the “political thicket” of redistricting, calling the malapportionment question a political one that was not meant for “judicial determination.”<sup>10</sup> A series of 15 U.S. Supreme Court cases in the 1960s reversed that trend,<sup>11</sup> first by declaring that

the issue was within the jurisdiction of federal courts and could be settled by judicial action, and then by setting general legal principles to guide the apportionment and districting process. These principles still provide the ground rules for any redistricting efforts.

Key among them was that the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution required states to treat voters equally, regardless of where the voter lived.<sup>12</sup> In one landmark case, *Reynolds v. Sims*, Chief Justice Earl Warren wrote for the majority, stating:

The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.<sup>13</sup>

Other important developments from these cases were that:

- seats in both chambers of a bicameral legislative body should be apportioned based on population;
- “little federal systems” were not constitutionally permissible;
- while mathematical precision is not required, districting should be carried out using substantial equality of population; and
- citizens could not use referenda or initiatives to create districting plans that are based on any principle other than population equality.<sup>14</sup>

Chief Justice Warren summed up the “one person, one vote” concept when he wrote:

(N)either history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes. Considerations of

<sup>6</sup> U.S. Constitution., Article I, section 2.

<sup>7</sup> Ellis Waldron; “100 Years of Reapportionment in Montana,” 28 *Montana Law Review* 1, p. 2; Fall 1966.

<sup>8</sup> *Ibid.*

<sup>9</sup> For further reading on the extent of this malapportionment, see Ellis Waldron; “Legislative Reapportionment,” Constitutional Convention Memorandum No. 10; Montana Constitutional Convention Commission; 1972.

<sup>10</sup> Justice Felix Frankfurter, writing for the Court in *Colegrove v. Green*, 328 U.S. 549 (1946). As a result of this case and others that continued to view reapportionment and redistricting as political questions best answered by state legislatures and Congress, malapportionment continued unabated for several more decades.

<sup>11</sup> Ellis Waldron; “100 Years of Reapportionment in Montana,” 28 *Montana Law Review* 1, p. 6; Fall 1966.

<sup>12</sup> John Dudis; “Apportionment: Past to Future,” Comment; 33 *Montana Law Review* 1, pp.109-110; Winter 1972.

<sup>13</sup> *Reynolds v. Sims*, 377 U.S. 533 (1964).

<sup>14</sup> John Dudis; “Apportionment: Past to Future,” Comment; 33 *Montana Law Review* 1, pp. 109-110; Winter 1972.

area alone provide an insufficient justification for deviations from the equal population principle. Again, people, not land or trees or pastures, vote.<sup>15</sup>

For Montana, the reapportionment cases required dramatic changes in the state's method of apportioning legislators. More significantly, those changes had noticeable political effects on the makeup of future legislatures, shifting the balance of power in the state from the sparsely populated, mostly agrarian rural areas to the more densely populated and growing urban areas.

By the time the 39th Legislature met in January 1965, it already faced tough redistricting decisions. A three-judge federal district court panel, in response to a lawsuit from a Montana citizen, gave the Legislature time to deal with the malapportionment of the state before the court ruled in the matter. Understandably, given the makeup of the legislative body and the political consequences of compliance with federal law, the Legislature had difficulty redistricting itself.

In late summer of 1965, after the Legislature had adjourned without enacting a plan, the federal court issued its own plan for the 1966 elections, giving the Legislature another chance to develop a new system in 1967.<sup>16</sup> The 1967 Legislature, whose members were elected under the judicially mandated plan, passed legislation to hold the 1968 and 1970 elections using the same districts.<sup>17</sup> The 1972 elections were held using the same multi-member districts created in a second special session by the 1971 Legislature to elect delegates for the constitutional convention.<sup>18</sup>

## 1972 Constitution

The Montana Legislature's difficulty with reapportionment and redistricting provided a stark backdrop against which debate at the 1971-1972 Constitutional Convention took place. Convention delegates faced one of the central questions about redistricting: should a legislative body be

given the opportunity to determine the district boundaries for its members?

After several days and many motions, substitute motions, revised plans, and amendments, the delegates voted to create a commission to handle the apportionment and districting task, while reserving to the Legislature only the right to recommend but not require changes to the commission's plans. Majority and minority leaders in the Legislature would appoint the commission's first four members; those members would then select a fifth member. If they were unable to reach agreement on the fifth member, the Montana Supreme Court would make the appointment. None of the five members could be public officials.

When presenting the majority report of the convention's Legislative Committee to the full convention, Delegate Skari said the intention was to create a commission that

would be appointed by the legislative leadership but would be somewhat independent and autonomous. It would, in effect, bypass the Legislature from this point on. It is our aim to provide for the creation of a commission reasonably free of legislative pressure.<sup>19</sup>

Although the plan eventually adopted by the convention differed somewhat from the majority report (mostly in that it gave the Legislature the opportunity to recommend changes to the commission plan), the ultimate power of the commission to redistrict without having to gain legislative approval and the method of selecting commission members remained the same.

## Other Commissions

While "one person, one vote" remains an apt maxim summing up the idea behind redistricting, the reality of drawing maps based on that principle is far more convoluted and contentious, as Montana's history illustrates. The reason is precisely that mentioned by Delegate Skari: acceptable district lines for one person can seem irrational or contrived to another.

In an attempt to solve this conundrum and ameliorate some of the perceived problems associated with a political

<sup>15</sup> Reynolds v. Sims, 377 U.S. 533 (1964).

<sup>16</sup> Summary from: Ellis Waldron; "100 Years of Reapportionment in Montana," 28 Montana Law Review 1, pp. 9-18; Fall 1966.

<sup>17</sup> John Dudis; "Apportionment: Past to Future," Comment; 33 Montana Law Review 1, p. 119; Winter 1972.

<sup>18</sup> Ellis Waldron; "Legislative Reapportionment," Constitutional Convention Memorandum No. 10; Montana Constitutional Convention Commission; 1972.

<sup>19</sup> Verbatim Transcript; Montana Constitutional Convention; Vol. IV, p. 682.



body creating boundaries for its members, many states have removed the redistricting process from legislative control. Twelve other states besides Montana use some form of a commission to redistrict state legislatures. Another two create an advisory commission, while five have a backup commission should the legislature be unable to agree upon a plan.<sup>20</sup>

Among the twelve states that use a primary commission, four redistrict in a manner similar to Montana. Alaska, Arizona, Idaho, and Washington have commissions composed of citizens (no public officials allowed) who are appointed in a variety of ways, but generally by political leaders in the state.<sup>21</sup> Most of these states' constitutions give the commission authority over redistricting independent of the executive or legislative branch. Washington does allow its legislature to make limited amendments to the commission's plan, but only with a two-thirds vote of the legislature and only for a limited percentage of a district's population. As in Montana, commissioners in these states are prohibited from running for office for a period of time after their work is done. The length of time and specificity of the ban varies from state to state.

Among the other seven states using a primary commission method for state legislative redistricting, there are as many different structures as there are states. For example, Hawaii redistricts by commission, but public officials are not prohibited from serving on the commission. However, the commissioners are banned from becoming candidates for the state Legislature or U.S. House of Representatives for a period of time after the commission's work is completed. Hawaii also uses an advisory council to provide input from each of the state's islands. In Missouri, there are two commissions, one for each chamber. In Arkansas, the commission consists of the governor, secretary of state, and attorney general.

### As the Bingo Cage Turns

The most recent addition to the commission fold is California, whose voters approved by a narrow margin

a 2008 initiative – the Voters FIRST Act (the Act)<sup>22</sup> – to transfer authority for legislative redistricting from the legislature to a citizen commission. The upcoming redistricting cycle will be the first conducted under this new commission system. But to call the California commission “similar” to Montana's would be a stretch. Indeed, it is unlike any other commission in the nation, mainly because of the selection process for commissioners and the specificity of the criteria the Act sets out for the commission to follow when drawing plans.

On its face, the Act is enormously complex, especially compared with redistricting commissions in other states. However, the complexity is an attempt by voters to bring a level of transparency to the process, while ensuring a level of balance between the state's diverse political, social, economic, and racial interests.

The Act begins simply enough, assigning the responsibility for drawing senate, assembly, and board of equalization districts to a 14-member citizen commission and establishing certain requirements for terms of office and quorums. It gets more specific when discussing the qualifications of the citizen members, including a provision to balance the commissioners' various political affiliations between the two main parties and independent or third-party voters.

The California structure also includes a restriction commonly seen in other commission states: a ban on holding public office for a period of years after service on the commission. However, it goes a step farther than most states by creating a 5-year ban on commissioners holding any appointed office, becoming a lobbyist at any level of government, or serving as a paid staff to the legislature or a legislator.

It gets down to real details when outlining six criteria prioritized in order of importance to be used by the commission to guide its work. Most, though not all, are similar to those seen in other states, and several reflect federal case law governing redistricting.

The Act establishes a complex process for the selection of commissioners. All California registered voters who

20 “Redistricting Commissions: Legislative Plans,” National Conference of State Legislatures; available from: <http://www.ncsl.org/?tabid=16617>; accessed July 8, 2010.

21 Appointments to the Arizona commission are made by a commission that also handles appellate court appointees.

22 A copy of the Act can be found at [http://www.wedrawthelines.ca.gov/downloads/voters\\_first\\_act.pdf](http://www.wedrawthelines.ca.gov/downloads/voters_first_act.pdf). The rest of this section relies heavily on the text of the Act.

have voted in at least two of the last three general elections and who have been registered to vote continuously for the past 5 years with the same political party affiliation are eligible to apply to the State Auditor for a seat on the commission. The auditor's office (an office that previously had nothing to do with the redistricting process) must eliminate applicants who within 10 years previous to their application have:

- been a candidate for or elected or appointed to a federal or California state office;
- served as an officer, employee, or paid consultant of a California political party or a campaign committee for a state or federal candidate for office;
- been on a party central committee;
- been a registered lobbyist at the federal, state, or local level in California;
- been a paid congressional, legislative, or board of equalization staff member; or
- contributed \$2,000 or more to a candidate for federal, state, or local office in any year.<sup>23</sup>

After establishing an applicant pool, the auditor's office then selects three auditors at random from a pool of state-employed auditors. These auditors narrow down the applicant pool using standards outlined in the Act. They are subject to the same conflict-of-interest provisions as the applicants. Also, one auditor must be a member of the largest party in the state, another must be a member of the second-largest state party, and one must not be affiliated with any political party.

After the selection panel winnows the applicant field to 60 qualified applicants, the list goes to four legislative leaders, who may then eliminate up to two applicants each.

Once the eliminations are made, the remaining applicants form the pool for a random drawing conducted by the state auditor. To ensure that no funny business happens at this late stage in the game, the auditor's office even issued administrative rules declaring the type and style of bingo balls to be used, as well as that the bingo cage used for the drawing must be "rotated vigorously" before any selections are made.<sup>24</sup>

<sup>23</sup> The above restrictions also apply to members of the applicant's immediate family.

<sup>24</sup> Regulations for Voters FIRST Act; California State Auditor's Office; available from: <http://www.wedrawthelines.ca.gov/downloads/regulations.pdf>; accessed Sept. 16, 2010.

Eight commissioners, including three from each of the two largest parties and two that are not members of either party, are then selected by a random drawing of bingo balls. The eight commissioners review the remaining applicants and appoint the last six commissioners. The six must be balanced as to major party affiliation or lack thereof.

The whole selection process must be completed by Dec. 31 of the year before census results are released.

The Act provides voters one final check on the redistricting process. Under the California Constitution, Californians have 90 days after the enactment date of a law to submit a petition to the secretary of state with a specified number of signatures to request a referendum. The Act makes the commission's redistricting plans submit to this constitutional provision. If the voters decide to toss out one or all of the plans, the rejected plan will be replaced by one created by a commission of special masters appointed by the California Supreme Court.

The Act was controversial on the 2008 ballot and remains so today. In fact, voters in the upcoming general election in California will face two initiatives related to the Act. Proposition 20 would expand the commission's authority to include redistricting congressional districts in the state. Proposition 27 would return to the state legislature the ability to redistrict itself, while keeping some of the open meeting requirements and districting criteria contained in the Act.

As California's complex redistricting commission makes clear, there are many ways in which states can redistrict their political boundaries. In the end, though, all are striving to meet the same goal, that of "one person, one vote."

### **The Montana Commission**

Legislative leaders appointed four members of the current Montana Districting and Apportionment Commission in spring 2009, in the waning days of the 61st legislative session. Those four are:

- Linda Vaughey, appointed by Senate Majority Leader Jim Peterson;
- Pat Smith, appointed by Senate Minority Leader Carol Williams;

- Joe Lamson, appointed by House Majority Leader Margaret Campbell; and
- Jon Bennion, appointed by House Minority Leader Scott Sales.

In late May 2009, the Montana Supreme Court appointed former state Supreme Court Justice Jim Regnier of Lakeside as the fifth member and presiding officer. The five commissioners held several meetings throughout 2009

and 2010 to determine how they will conduct their work after they receive census data in early 2011.

To keep informed about the commission's work, visit its website at [leg.mt.gov/districting](http://leg.mt.gov/districting). If you wish to receive e-mail updates about upcoming meetings and other commission activities, visit [leg.mt.gov/css/Lyris/email\\_login.asp](http://leg.mt.gov/css/Lyris/email_login.asp) and enter your e-mail address.

**All interim committee meetings are held in the Capitol in Helena unless otherwise noted.**

October 2010						
Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
					1	2
3	4	5	6	7 LFC Performance Measurement Work Groups, 2 pm, Capitol	8 Legislative Finance Comm, 8:30 am, Rm 102	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24/31	25	26	27	28	29	30

November 2010						
Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16 Legislative Finance Comm, time & place TBA  Legislative Council, time & place TBA	17 Legislative Caucuses  Legislator Orientation & Training	18 Legislator Orientation & Training	19 Legislator Orientation & Training  Revenue & Transportation Comm, time & place TBA	20
21	22	23	24	25	26	27
28	29	30				

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